

ADMINISTRATIVE APPEAL DECISION

VIRGIL M. CURTIS, JR.; FILE NO. 200101268

LOUISVILLE DISTRICT

SEPTEMBER 3, 2002

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344).

Receipt of Request For Appeal (RFA): November 23, 2001.

Site Visit: January 23, 2002.

Background Information: The 8.65-acre site is located southwest of the intersection of State Route 54 and Jack Hinton Road in the Town of Philpot, Daviess County, Kentucky. Mr. Curtis requested Corps wetland determinations in 1994 and 2001. Personnel with the Louisville District regulatory staff (District) performed site visits on May 12, 1994 and again on September 20, 2001. Caney Creek flows along the western boundary of the property and the site is predominantly composed of young successional deciduous forest. A man-made ditch flows west along the southern boundary of the site and outlets into Caney Creek. The site contains predominantly Waverly silt loam, a poorly drained hydric soil. A somewhat poorly drained soil series, Belknap silt loam, is indicated along the eastern boundary of the site near Jack Hinton Road (Daviess and Hancock Counties soil survey). The site is depressional due to elevated roadbeds to the north and east and slight dredge spoil berms adjoining the manmade ditch and creek. Caney Creek is a tributary of Panther Creek (via the North Fork), the Green River and ultimately the Ohio River. The Green and Ohio Rivers are navigable waterways.

A District letter, dated October 1~~7~~, 2001 to the appellant, informed him that the subject property contained jurisdictional "waters of the United States". Mr. Curtis has appealed this determination to the Division office. Based on the RFA, the appellant claims that the vegetation (trees) and site hydrology do not support the District's determination that the site is wetland. Mr. Curtis acknowledges that water enters the site when Caney Creek and Panther Creek overflow but asserts that the water only remains two or three days.

In a December 28, 2001 letter to the appellant, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Appeal Decision and Instructions to the Louisville District Commander (DE):

Appeal Reason 1: The vegetation (trees) and site hydrology do not, in Mr. Curtis' opinion, support the District's determination that wetlands are present on his property.

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

The district's documentation supports their conclusion that the site contains jurisdictional waters of the U.S. During the second site visit, on September 20, 2001, data was collected at three sample points. The Routine Wetland Determination Data Forms indicate the presence of all three wetland criteria - hydric soils, hydrophytic vegetation and hydrology - and were completed in accordance with the *1987 Corps of Engineers Wetland Delineation Manual* and subsequent Corps headquarters guidance issued on October 7, 1991 and March 6, 1992. The district's May 31, 1994 site visit notes also indicate the three wetland parameters were observed (although no data forms were completed). The site notes also state Mr. Curtis showed the district staff a letter he had received from the Soil Conservation Service (now Natural Resources Conservation Service). The letter indicated that an SCS employee had also done a site visit and concluded that the property contained jurisdictional wetlands.

A majority of the site meets the Corps definition of a jurisdictional wetland:

Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Title 33 of the Code of Federal Regulations Part 328.3(b)

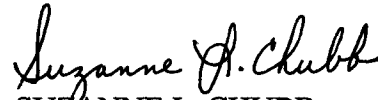
Furthermore, the wetland is located adjacent to Caney Creek, a tributary to navigable waters. This meets the definition of waters of the United States at 33 CFR 328.3(a)(7), and, as such, is subject to the Clean Water Act jurisdiction of the Corps.

The District's decision is a determination that jurisdictional waters of the U.S. are present on the site. The District project manager has clarified that he did not delineate the wetland boundaries and that some upland areas are present along the northern and eastern site boundaries, near State Route 54 and Jack Hinton Road. However, a majority of the site is jurisdictional waters of the U.S.

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Conclusion: For the reasons stated above, I conclude that this Request For Appeal does not have merit.

FOR THE COMMANDER:


SUZANNE L. CHUBB
Appeal Review Officer
Great Lakes & Ohio River Division